NO. 84-6689

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

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SUPREME COURT, U.S.

HARVEY AND REBECCA RUMBAUGH, INDIVIDUALLY
AND AS NEXT FRIENDS OF CHARLES RUMBAUGH,

Petitioners,

v.

R. K. PROCUNIER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE COURT BELOW PROPERLY APPLIED THE STANDARD ARTICULATED IN REES V. PEYTON, 384 U.S. 312 (1966), FOR DETERMINING MENTAL COMPETENCY TO WAIVE COLLATERAL REVIEW OF A STATE CONVICTION AND SENTENCE?

II. WHETHER THE DETERMINATION OF MENTAL COMPETENCY IS A QUESTION OF FACT, OR A MIXED QUESTION OF FACT AND LAW WHOSE RESOLUTION TURNS PRIMARILY ON THE APPLICATION OF A PROPER LEGAL STANDARD?

III. WHETHER THE COURT BELOW PROPERLY APPLIED THE CLEARLY ERRONEOUS STANDARD FOR REVIEW TO THE DISTRICT COURT'S FACTUAL FINDING THAT CHARLES RUMBAUGH IS COMPETENT TO WAIVE COLLATERAL REVIEW?

IV. WHETHER THE EIGHTH AMENDMENT REQUIRES THE STATE TO BEAR THE BURDEN OF PROVING MENTAL COMPETENCY TO WAIVE COLLATERAL REVIEW?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES R. K. Procunier, Director, Texas Department of Corrections, Respondent herein, by and through his attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is published at 753 F.2d 395 (5th Cir. 1985) and is reproduced as Appendix A to the Petition for Writ of Certiorari. The Suggestion for Rehearing En Banc was denied March 21, 1985, and is reproduced as Appendix B to the Petition for Writ of Certiorari. The opinion of the United States District Court for the Northern District of Texas, Amarillo Division, is published at 558 F.Supp. 651 (N.D. Tex. 1983) and is reproduced as Appendix C to the Petition for Writ of Certiorari.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court under Sup. Ct. R. 17, 28 U.S.C. (1980). They do not, however, articulate the statutory basis under which this Court's jurisdiction may be invoked.

The court below, affirming the district court's factual finding that Charles Rumbaugh has sufficient mental competence to waive his rights to further judicial review of his conviction and sentence, dismissed Petitioner's "next friend" petition for lack of jurisdiction. Thus, this case was never properly "in" the Court of Appeals below and jurisdiction exists only under 28 U.S.C. § 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners base their claims upon the sixth, eighth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioners' description of the legal proceedings below is essentially correct. A complete synopsis of the procedural background and facts is set forth in the opinion of the court below. Rumbaugh v. Procunier, 753 F.2d at 396-402.

SUMMARY OF ARGUMENT

No exceptional circumstances exist to justify the exercise of this Court's certiorari jurisdiction under 28 U.S.C. § 1651. The question of Charles Rumbaugh's competency to waive collateral review of his state conviction and sentence was resolved against Petitioners after a complete evidentiary hearing wherein in-court psychiatric testimony and Petitioner's own statements were presented. Weighing the testimony and assessing the credibility of the experts, and evaluating Charles Rumbaugh's in-court testimony and demeanor, the district court reached the factual conclusions that Rumbaugh has a realistic understanding of his present position and of the choices available to him, and that he is mentally competent to make a rational choice with respect to continuing or abandoning further litigation. After extensive

briefing, argument and review of the evidence presented to the district court, as well as Rumbaugh's post-decision actions, the court below found sufficient support for the district court's findings and accorded proper deference. Maggio v. Fulford, 462 U.S. 111 (1983).

Nor will the granting of this writ aid in this Court's appellate jurisdiction. It is unquestionably clear that "next friend" petitioners lack standing to file a habeas corpus application on a death sentenced inmate's behalf, absent a showing of mental incompetency. Lenhard v. Wolff, 444 U.S. 807 (1979); Evans v. Bennett, 440 U.S. 1301 (1979); Gilmore v. Utah, 429 U.S. 1012 (1976).

Finally, Petitioners cannot demonstrate that adequate relief cannot be had in any other forum. At present Charles Rumbaugh is not facing an imminent execution date. Being competent to make a rational choice as to whether to seek or forego further litigation on his own behalf, he may very well elect to seek collateral review.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Sup. Ct. R. 26, 28 U.S.C. (1980), provides:

> The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any writ under that provision, it must be shown that the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court.

Petitioners have failed to show reasons sufficient to meet the above standard, and none exists.

Petitioners raise four interrelated questions, all of which involve only evidentiary determinations and the proper application of established constitutional standards for review of

Charles Rumbaugh's unique factual circumstances. Thus, no exceptional circumstances exist.

Moreover, as discussed in Sections II-III herein, both courts below exhaustively reviewed the evidence as to Rumbaugh's mental competency to waive collateral review and concluded that he is, in fact, competent. This Court has made unquestionably clear that, absent a showing that Rumbaugh is mentally incompetent, Petitioners lack standing to maintain a "next friend" habeas corpus action on his behalf. Lenhard v. Wolff, 444 U.S. 807 (1979); Evans v. Bennett, 440 U.S. 1301 (1979); Gilmore v. Utah, 429 U.S. 1012 (1976). Petitioners cannot demonstrate that the granting of this writ will aid the Court's appellate jurisdiction.

Nor can Petitioners demonstrate that adequate relief cannot be had in any other forum. At present, Charles Rumbaugh is not facing an imminent execution date. Being competent to make a rational choice as to whether to seek or forego further litigation on his own behalf, he may very well elect to seek collateral review.

Interestingly, this case presents exceptional circumstances why this Court should not exercise the authority vested to it under 28 U.S.C. § 1651. Charles Rumbaugh has been asserting his competency and his choice to forego federal habeas review since June 1982. Two separate federal courts have determined that he is mentally competent. Because of the actions of his "next friends," "however worthy and high minded" their motives may be, Charles Rumbaugh has been living under conditions which he finds miserable and intolerable for almost three years. The concern expressed by Justice Rehnquist in Lenhard v. Wolff, has become a reality for Charles Rumbaugh: He has become "a pawn to be manipulated on a chessboard larger than his own case." 443 U.S. at 1312. Charles Rumbaugh is entitled to the acute sensitivity accorded by the court below in evaluating his decision.

II.

THE COURT BELOW PROPERLY APPLIED THE STANDARD OF REES V. PEYTON.

The standard used by the court of appeals and the district court in deciding whether Charles Rumbaugh is mentally competent to waive collateral review of his state conviction and sentence is that standard articulated by the Court in Rees v. Peyton, 384 U.S. 312, 314 (1966):

> Whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

The Court of Appeals delineated this standard as requiring the answer to three questions:

> (1) Is the person suffering from a mental disease or defect?
>
> (2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?
>
> (3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?
>
> If the answer to the first question is no, the court need go no further, the person is competent. If both the first and second questions are answered in the affirmative, the person is incompetent and the third question need not be addressed. If the first question is answered yes and the second is answered no, the third question is determinative; if yes, the person is incompetent, if no, the person is competent.

Rumbaugh v. Procunier, 753 F.2d at 398-99.

Carefully reviewing the psychiatric reports and in-court testimony presented at the evidentiary hearing, the district court found that "Charles Rumbaugh has a realistic understanding of his present position and of the choices available to him, and that he is mentally competent to make a rational choice with respect to continuing or abandoning further litigation."

Rumbaugh on Behalf of Rumbaugh v. Estelle, 558 F.Supp. at 654. On appeal, the court below held the question of mental competency, analyzed under the Rees standard, to be essentially a factual question, subject to the "clearly erroneous" standard of review of Fed. R. Civ. Proc. 52(a). Comprehensively examining the evidence presented to the district court and after extensive oral argument, the court below reached the following conclusion:

> As we appreciate Dr. Logan's reports and testimony, and considering Rumbaugh's written answers to the extensive questions posed, it appears that Charles Rumbaugh is able to feed relevant facts into a rational decision-making process and come to a reasoned decision; that one of the facts fed into the process is that Rumbaugh is mentally ill, he has severe depression, with no hope of successful treatment which would reduce his current mental discomfort to a tolerable level or enable him to exist in the general prison population or the outside world if his appeals were successful; that Rumbaugh's assessment of his legal and medical situations, and the options available to him, are reasonable; but that if the medical situation vis-vis treatment were different, Rumbaugh might reach a different decision about continuing judicial proceedings. In other words, Rumbaugh's disease influences his decision because it is the source of mental pain which contributes to his invitation of death.
>
> Rumbaugh's written answers to the questions and his statements to the doctors and to the court clearly reflect his awareness of his legal situation and of his right to file state and federal habeas petitions. His answers to the questions list several arguably sound grounds for attack which could not be summarily rejected. Rumbaugh indicates adequate awareness of this reality. He understands his situation and his options. His ability to make the life/death choice is apparent from his comments to Dr. Logan that if he though that meaningful treatment were available and if it were offered, he would probably change his decision not to appeal. We find that decision to be the product of a reasonable assessment of the legal and medical facts and a reasoned thought process, albeit one that we would disagree with.
>
> Our conclusion that the evidence supports the district court's finding of competency is reinforced by Rumbaugh's actions after the district court's decision and while the appeal was under advisement. He filed an extremely coherent and well-reasoned pro se state habeas corpus petition. That petition states substantial grounds for attacking his conviction and sentence. When it became

> apparent that this appeal would not be dismissed because of the state petition, he withdrew his pro se petition, stating in his motion to dismiss that he believed the grounds substantial and well-founded but that he was making the choice not to appeal.
>
> Rumbaugh has striven mightily to prove his mental competence to make his legal decisions. He convinced the district court who presided over the dramatic hearings. We cannot tag that finding as clearly erroneous. Nor can we conclude as a matter of law that a person who finds his life situation intolerable and who welcomes an end to the life experience is necessarily legally incompetent to forgo further legal proceedings which might extend that experience. Gilmore v. Utah [429 U.S. 1012 (1976)].

Rumbaugh v. Procunier, 753 F.2d at 402-03.

III.

THE EVIDENCE PRESENTED SUPPORTS THE FINDING OF THE COURT BELOW THAT RUMBAUGH IS COMPETENT TO WAIVE COLLATERAL REVIEW OF HIS JUDGMENT AND SENTENCE.

Petitioners argue that "there is no support in law or reason" for treating the district court's factual conclusion that Charles Rumbaugh is mentally competent to waive collateral review of his state conviction and sentence as essentially a factual question. However, Petitioners apparently ignore this Court's decision in Maggio v. Fulford, 462 U.S. 111 (1983). As this Court did in Fulford, the court below properly accorded deference to the district court's factual conclusion of competency, properly refused to substitute its own judgment as to the credibility of the witnesses, and properly credited the district court's observations as to the demeanor of Charles Rumbaugh. 1/

1/ Fulford dealt with the application of the presumption of correctness doctrine enunciated in 28 U.S.C. § 2254(d). However, the rational for deference to the original finder of fact recognized in Fulford applies with equal force to findings of fact made by federal district courts pursuant to federal habeas review. See Anderson v. City of Bessemer City, N.D., __ U.S. __, 105 S.Ct. 1504 (1985), wherein this Court recently addressed the scope of Fed. R. Civ. P. 52(a) and the standard governing appellate review of a district court's factual findings.

Petitioners are essentially asking this Court to sit as a fact-finding court, to reassess the credibility choices and observations made by the district court, and to repudiate the analysis of the court below. They imply that because the court below held the question of competency to be essentially a factual question, the court below merely rubber stamped the district court's finding. They ask this court to hold, as a matter of federal constitutional law, that questions of competency require "do novo" review.

Whatever merit members of this Court may find to their argument (see Maggio v. Fulford, 462 U.S. at 118-20, Justice White, concurring, and 462 U.S. at 120-21, Justices Brennan, Stevens and Marshall, dissenting), it cannot be disputed that the court below did, in fact, conduct a de novo review of the evidence presented and found sufficient support for the conclusion that Charles Rumbaugh is competent to waive collateral review. The court below had before it all of the evidence presented to the district court, as well as Charles Rumbaugh's later actions after the district court decision. The arguments were comprehensively briefed by the parties and extensive oral argument heard. The court below, not being faced with an imminent execution date, had a substantial period of time in which to review the record and reach its decision, which on its face reflects the careful consideration given to the evidence and issue presented. There is no doubt that the court below gave comprehensive judicial scrutiny to the issue of Rumbaugh's competency, but was unable to find legal authority for entertaining the next friend petition.

In asking this Court to re-evaluate the evidence presented, Petitioners argue that "the evidence is undisputed that Rumbaugh has long suffered from a mental disorder that may and does substantially affect his capacity to understand his legal position and to make a rational decision to either continue or abandon further litigation." Petition for Writ of Certiorari

at 17. Petitioners base their entire argument on the statements by Dr. Logan in his report and at the evidentiary hearing that Rumbaugh's depression "substantially affected his capacity in the premises," and rely heavily on the opinion of Drs. Kaufman and Dickerson.

The crux of Dr. Logan's testimony is set forth in the opinion of the court below. He maintained that Rumbaugh's depression is realistic and based upon an excellent understanding and appreciation of his current situation and the options available to him. Although this depression may impair Rumbaugh's exercise of "free will" (a term which the experts agreed constitutes a philosophical, not medical or legal, concept), Rumbaugh's decision may be considered rational. In a philosophical sense, "free will" is on a continuum, and nothing one does is really of "free will." Finally, and most significantly, Dr. Logan affirmed that all persons are substantially affected by the environment in which they exist.

Dr. Kaufman, a psychiatrist presented by Petitioners, testified that Dr. Logan's opinion that Rumbaugh has the capacity to appreciate his position and choices and that his decision to decline further litigation is rational, in inconsistent with the further opinion that the depression which Rumbaugh is suffering does substantially affect his capacity (Tr. 65-66). Dr. Kaufman recognized that Rumbaugh's case presented a circular problem, that is that Rumbaugh's experience with unsuccessful treatment led him to believe that there was no hope for improvement in his condition; that this belief was realistic, and that his desire to die to escape his current mental problems also is realistic (Tr. 82). It was Dr. Kaufman's opinion, based upon his interpretation of the psychiatric reports, that Rumbaugh is suffering from a major mental illness which is depression, that this depression does substantially affect his capacity to appreciate his position and make a rational choice and that therefore he is not competent at this time (Tr. 84).

Dr. Kaufman, however, admitted that he had little experience with persons accused of crimes, that he was unaware whether Rumbaugh had ever been psychiatrically treated before, that he did not know whether it would be unusual for a person twice convicted of capital murder, twice receiving the death penalty, who had been on death row for seven years with little prospect of being released, to be depressed, as he had had no experience with death row inmates (Tr. 84, 85-86, 93). Dr. Kaufman admitted that Rumbaugh had a rational understanding of his legal situation and the options available to him and that he has made and can make logical choices about those options (Tr. 97-98). According to Dr. Kaufman, if Rumbaugh were conferring with his attorneys, he could probably help them substantially in terms of case management (Tr. 98). He acknowledged that the terms "willful" and "free will" are philosophical terms and not medical terms, and he conceded that there is a long history of philosophical dispute as to what constitutes free will. Dr. Kaufman also conceded that even if a person is diagnosed as having a major depressive episode, that person still could make choices that express free will (Tr. 99-100, 114). Thus, the testimony of Dr. Kaufman, much of which was impeached by his subsequent testimony as to his lack of experience with the criminal justice system, was not credited by the courts below where it conflicted with other testimony.

Dr. Dickerson, a psychologist also presented by Petitioners, testified that based upon his review of the records available, it was suggested that Rumbaugh is suffering from a major mental illness and has been all of his life. He had reservations whether Rumbaugh is competent to make a rational decision (Tr. 136). Upon cross-examination, however, Dr. Dickerson's testimony was impeached by his statements that he was unaware whether death row inmates were more depression-prone than non-death-sentenced persons (Tr. 137), and maintained that it could have been true that Rumbaugh had never made a rational choice regarding anything

in his entire life (Tr. 138). Dr. Dickerson also conceded that an anti-psychotic drug which Rumbaugh had been taking can cause depression and could have been a significant factor in any medical diagnosis of depression (Tr. 157).

Dr. Parker, experienced in the area of mental competency examinations (Tr. 160-61), offered evidence that it was not surprising for a death row inmate in Rumbaugh's situation to experience depression, but that, based upon test results and Rumbaugh's lengthy written responses offered into evidence, his depression, realistic in nature, was not so great as to preclude his making logical and rational decisions (Tr. 170-79, 85). The real issue, according to Dr. Parker, was the degree to which Rumbaugh was affected by his current assessment of his situation, keeping in mind that decisions are never made in a vacuum and that one's environment always affects one's decisions (Tr. 179). Finally, Dr. Parker maintained that Rumbaugh had the capacity to make a rational and logical decision, in spite of depression, and that his depression has not substantially or significantly diminished his decision making abilities.

Petitioners argue that the court below has "boldly rewritten" the Rees standard by requiring them to demonstrate that Rumbaugh's mental disorder "prevented" him from either understanding his position or making rational choices rather than that it "may have substantially affected" him in the premises. This argument clearly elevates form over substance, and constitutes a demand that this Court apply a simplistic evaluation to a complex philosophical and medical issue. All experts below agreed that Rumbaugh is depressed by his realistic and rational understanding of his current situation. Dr. Parker maintained, however, that this depression was not surprising and that it was not of such a degree as to significantly diminish Rumbaugh's capacity to make a decision. Finally, Dr. Logan's testimony that Rumbaugh's decision was substantially affected by his realistic depression arising from his rational appreciation of his circumstances,

constitutes a philosophical, not legal, analysis, as everyone is substantially affected by his environment. Such questions do not jusitfy the exercise of the Court's certiorari jurisdiction. Tacon v. Arizona, 410 U.S. 351, 352 (1973); Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

IV.

THE COURT HAS PREVIOUSLY RECOGNIZED THAT THE NEXT FRIEND PETITIONER BEARS THE BURDEN OF PROVING THAT THE DEATH-SENTENCED INMATE IS INCOMPETENT TO WAIVE FURTHER JUDICIAL REVIEW.

Petitioners make a conclusory argument that the eight amendment requires the state to bear the burden of proving a defendant's competency to waive collateral review. However, this Court has made clear beyond question that the burden of proving that Charles Rumbaugh is incompetent is on the Petitioners seeking to act in his behalf. Lenhard v. Wolff, 444 U.S. 807 (1979); Evans v. Bennett, 440 U.S. 1301 (1979); Gilmore v. Utah, 429 U.S. 1012 (1976).

CONCLUSION

For these reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JIM MATTOX
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THE ATTORNEY GENERAL
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JIM MATTOX
ATTORNEY GENERAL

June 5, 1985

The Honorable Alexander L. Stevas
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: Harvey and Rebecca Rumbaugh, Individually and as Next Friends of Charles Rumbaugh v. Procunier, No. 84-6689

Dear Mr. Stevas:

Enclosed for filing with the papers in the above styled cause are the original and nine typewritten copies of Respondent's Brief in Opposition. Also enclosed are the Proof of Service and Appearance of Counsel forms.

By copy of this letter, one copy of said brief has been sent to counsel for Petitioners.

Thank you for your kind assistance in this matter.

Yours truly,

PAULA C. OFFENHAUSER
Assistant Attorney General

PCO/11k
Enclosures

cc: Mr. Will Gray
Ms. Carolyn Garcia
2038 Lexington
Houston, Texas 77098

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PROOF OF SERVICE

I hereby certify that on the 5th day of June, 1985, one copy of the Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. Will Gray and Ms. Carolyn Garcia, 2038 Lexington, Houston, Texas 77098. All parties required to be served have been served. I am a member of the Bar of this Court.

PAULA C. OFFENHAUSER
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ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME this 5th day of June, 1985.

NOTARY PUBLIC in and for
Travis County, T E X A S